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In the Supreme Court of the United States

October Term 1975

No. 75-567

STATE OF OREGON, Acting by and through the State Land Board,

Petitioner,

v.

CORVALLIS SAND AND GRAVEL COMPANY, an Oregon corporation,

Respondent.

ANSWERING BRIEF OF RESPONDENT

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I hereby certif hat I served the foregoing Answering Brief for Respondent on Peter Herman, of attorneys for petitioner on the day of March, 1976, by mailing to him three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in a sealed envelope addressed to the said attorney at Department of Justice, 103 State Office Building, Salem, Oregon 97310, which is his regular office address, or his address as last given by him on a document which he has filed in the within entitled cause and served on me; said sealed envelope was then deposited in the United States post office at Corvallis, Oregon, on the day last above mentioned, with the postage thereon fully paid.

Robert Mix
Attorney for Respondent

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Respondent.

On Writ of Certiorari to the Supreme Court of the State of Oregon

---

ANSWERING BRIEF OF RESPONDENT

STATEMENT OF FACTS

Respondent Corvallis Sand and Gravel Company (Corvallis Sand) is the record owner of the land underlying Fischer Cut, the property in its entirety having originally been patented out by the United States. (Exs. 263, 264, 265) Petitioner State of

Oregon (State) acknowledges that the land underlying the cut was in private ownership. (Brief for Petitioner, p. 7)[1] The Fischers deeded the property to Corvallis Sand. (Ex. 263)

The trial court made the following findings of fact relative to Fischer Cut:[2]

> "3. In 1890 Fischer Cut would have had to be cleared of driftwood and willow growth before it could possibly accommodate the flow of the river. The Fischer Cut Channel was dry at low water, or below the five-foot stage, and carried water only at intermediate or high stages of the river.
>
> "4. In January of 1906 the Fischer Cut Channel was in practically the same location as it was in 1890. It was estimated then that roughly one-quarter of the flow of the river was carried through Fischer Cut.
>
> "5. Between 1890 and 1909 the high water overflow through Fischer Cut did not sufficiently clear Fischer Cut to allow for the full flow of the river and the river continued to flow around Fischer's Island during that period.

---

(1)"Fischer Island and Fischer Cut were owned by the Fischer Family."

(2)While the action was one at law, the parties stipulated that it should be tried to the court sitting without a jury. The trial judge, as the trier of facts, made the quoted findings.

> "6. As a result of a flood of November 25, 1909, the river suddenly and with great force and violence converted Fischer Cut into the main channel of the river.
>
> "7. The change was not gradual and imperceptible but was a rapid and violent change of course, avulsive in character and constituted an avulsion.
>
> "8. Parcels 2A, 2B and 2C combined are included in the area known as Fischer Cut."
>
> Appendix, 180-181

Both the Oregon Court of Appeals and Oregon Supreme Court concurred in the findings.

These findings were based on at least the following evidence:

1. The testimony of retired Circuit Court Judge Fred McHenry who had observed the change of channel shortly after its occurrence and stated that the change was a subject of common community discussion. (App. 171.) [This testimony was inadvertently omitted from the Appendix.]

2. The testimony of Douglas Hastie who lived in the community at the time and who stated that the flood of 1909 occurred around Thanksgiving day and was extremely high and who was told that the river broke through Fischer Cut in 1909 and made a new channel. (App. 63-65)

3. Exhibit 62, the 1890 map prepared by J. M.

Clapp, which showed the main channel flowing around Fischer Island in a loop with a high water chute in the approximate location which became Fischer Cut in 1909. (App. 40) As shown by the profile at the bottom of exhibit 62 water flowed though this chute only when it reached a level five feet above normal high water. (Fred Fischer, the state's witness, testified that water flowed in the "gully" (Fischer Cut) only "During the winter rainy season". (App. 47))

4. Exhibit 110-A, the Corps report of January 10, 1906, which identified the chute as the "high water 'cut off' channel". (App. 103)

5. The U. S. Geological survey map of 1911-1913 (Ex. 257) which is the first survey made after the 1909 change of channel and which shows the main river to be in the Fischer Cut area with the former main loop channel narrowed to the point (compared with Ex. 62) where only a small amount of water could flow through it. (App. 41)

6. The testimony of Corvallis Sand's river hydraulics expert Peter Klingeman, "an avulsive change of channel took place..." (Tr. 1091)

SUMMARY OF ARGUMENT

1.

The State of Oregon does not own the beds of any navigable fresh water streams and therefore does not own Fischer Cut. (Based on the brief of petitioner in case no. 57-577 incorporated by reference.)

2.

The trial court found that an avulsive change of channel had taken place in 1909 which resulted in the new channel flowing through Fischer Cut. The Oregon Court of Appeals and the Supreme Court of the State of Oregon both concurred in the finding. The Constitution of the State of Oregon prohibits an appellate court from re-examining any fact found by a trial court unless the reviewing court "...can affirmatively say there is no evidence to support the verdict."

This court does not grant certiorari to review questions of evidence.

Based on the foregoing, the question of whether or not the change was avulsive is not reviewable by this court.

3.

There are numerous definitions of avulsion, the most practical one being "...when the change [of channel] is not by accretion, it is by avulsion." Anderson-Tully v. Franklin, D.C. (N.D. Miss.) (1960), 307 Fed. Supp. 539, 540. After the flood of 1909 almost all the water of the Willamette river flowed through Fischer Cut. The change of channel took place during the flood and was not an "erosion" (a gradual eating away of the bank) as contended by State but was a major change of channel. The land underlying the bed was in private ownership, the original patent having been issued by the United States. As such, the land is not "riparian" and the issue should not be considered as a dispute between a riparian

owner and the state.

Since the Romans, the law has been that an avulsive change of channel makes no change in ownership of the underlying bed. Except for one Texas case based on a statute of doubtful constitutionality, there is no authority for the giving of title to private land to the state.

The fact that water flowed through the Fischer Cut area prior to 1909 during high water stages of the river is irrelevant.

The doctrine of submergence should be applied under which there is no loss of title to the land underlying the new channel. The land is, however, subject to the public navigational servitude. Bonelli Cattle Co. v. Arizona, 414 U.S. 313, 38 L. Ed.2d 526, 542, 94 S.Ct. 517.

4.

No evidence was introduced at the trial as to the condition, use or ownership of the former loop channel around Fischer Island. The ownership of that channel is not properly before this court.

If it is before the court, the channel, being dry, is no longer needed for public navigation and would belong to the riparian owners on either bank of the abandoned channel. Bonelli, supra, 38 L.Ed. at 539, 541, 544.

5.

To grant title to the State of Oregon of the

land underlying Fischer Cut would be a taking of private property without compensation and in violation of due process.

Since the Romans, the law has been that an avulsive change of channel does not work any change in ownership of the underlying bed. This is universal common law both in England and the United States. To grant title to the state would be a violation of due process.

6.

There is no reason why title to the land underlying the Fischer Cut channel should be granted to the State of Oregon. The law is settled that the state has control of the fishery in the area and that the public has the right to use the water for purposes of navigation and recreational uses and to transport logs. The implementation of the Oregon "Greenway" act, relied upon by State, which act provides for the preservation of the beauty of the river and of historic sites, is not a valid reason for granting title to State as the act contemplates the acquisition of private property by condemnation and does not contemplate taking river bottom land, particularly land which is not riparian.

The claim that the land is needed so that State can make a profit from sale of minerals, sand and gravel, gas and sulphur, kelp and seaweed does not justify transferring the title to State which would deprive the private landowner of his proper profits available from the soil. Also, the profit motive is not a sufficient reason for granting title to State. Port of St. Helens v. Oregon, Civil No. 74-572 (D.

Or. August 28, 1975, modified October 2, 1975).

State's claim that it should be granted title to the bed so that it could sell and lease the land demonstrates the hypocrisy of State in its claim that it needs the land to protect public interests. It is wholly inconsistent to claim the land is required for the protection of the public while at the same time contending it must be acquired in order to be sold or leased.

PROPOSITION I

THE STATE DOES NOT OWN THE BEDS OF ANY NAVIGABLE FRESH WATER STREAMS AND THEREFORE DOES NOT OWN FISCHER CUT.

ARGUMENT

The Brief of Petitioner (Corvallis Sand and Gravel Company) in case no. 57-577 is incorporated by reference.

PROPOSITION II

THE FINDING BY THE TRIAL COURT, AFFIRMED BY THE OREGON COURT OF APPEALS AND THE SUPREME COURT OF OREGON, THAT AN AVULSIVE CHANGE OF CHANNEL HAD TAKEN PLACE IN FISCHER CUT, IS NOT REVIEWABLE.

ARGUMENT

The trial court found that the change of channel

into Fischer Cut:

> "...was not gradual and imperceptible but was a rapid and violent change of course, avulsive in character and constituted an avulsion." (App. 181)

This finding was based on the evidence summarized in Statement of Facts, supra p. 5, which evidence was substantial.

The Oregon Court of Appeals and the Supreme Court of the State of Oregon affirmed the finding.

The Constitution of Oregon prohibits the re-examination of any fact found by a trial court unless the reviewing court, "...can affirmatively say there is no evidence to support the verdict." (3)

This court does not grant certiorari to review the evidence or inferences drawn from it in the trial court and would not ordinarily grant certiorari to review decisions or judgments based solely on questions of fact. 32 AmJur 2d 679, Federal Practice and

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(3) "Jury trial; re-examination of issues by appellate court; record on appeal to Supreme Court; affirmance notwithstanding error; determination of case by Supreme Court. In actions at law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any court of this state, unless the court can affirmatively say there is no evidence to support the verdict." Constitution of Oregon, Article VII, Section 3.

Procedure, Sec. 227 citing General Talking Pictures Corp. v. Western Electric Co., 304 US 175, 82 L.Ed. 1273, 58 S.Ct. 849; National Labor Relations Bd. v. Waterman S. S. Corp., 309 U.S. 206, 84 L.Ed. 704, 60 S.Ct. 493, reh den 309 U.S. 696, 84 L.Ed. 1036, 60 S.Ct. 611; United States v. Johnston, 268 U.S. 220, 69 L.Ed. 925, 45 S.Ct. 496; Southern Power Co. v. North Carolina Pub. Serv. Co., 263 U.S. 508, 68 L. Ed. 413, 44 S.Ct. 164; and Houston Oil Co. v. Goodrich, 245 U.S. 440, 62 L.Ed. 385, 38 S.Ct. 140.

In view of the finding of the trial court there is nothing for this court to review.

PROPOSITION III

THE 1909 CHANGE OF CHANNEL OF THE WILLAMETTE RIVER THROUGH FISCHER CUT WAS AVULSIVE AND DID NOT RESULT IN ANY CHANGE OF OWNERSHIP OF THE BED UNDERLYING THE NEW CHANNEL.

ARGUMENT

State urges that despite the finding, the change was not avulsive as a matter of law because the river did not flow exclusively in the new channel immediately after the 1909 flood. Exhibit 257, Appendix 41, shows that by the time of the USGS survey of 1911-13 almost all of the river flowed in the new channel. State further contends that the change is not avulsive because there was water flowing in the new channel commencing in about 1890 when the river was four to five feet above normal water. State did not include in its facts the testimony of Fred Fischer,

its witness, that water flowed in the "gully" (the new channel) only "during the rainy season". (App. 47) Nor did State point out that the 1890 Corps survey by Clapp described the new channel as a "hi-water chute" in which water flowed only when the level reached five feet above normal. (Ex. 62, App. 40) The "gully" became the new channel of the river in 1909 during a major flood.

The principal that an avulsive change of channel works no change in the ownership of the underlying fee is as ancient as the Roman Law. See historical discussion Missouri v. Nebraska, 196 U.S. 23, 25 S.Ct. 155, 49 L.Ed. 372 (1904). This is also the law of Oregon. Wyckoff et al v. Mayfield, 130 Or 687, 691-692, 280 Pac 340 (1929).

The land underlying the new channel is not riparian land but was dry soil owned and occupied and on which taxes were being paid by the owner immediately prior to the inundation. As such, it is not subject to any of the law applicable to riparian property.

State contends, despite the magnitude and violence of the change of channel which occurred in 1909, that this change is an "erosion". "Erosion" means "the gradual washing away of land bordering on the stream or body of water by the action of the water." 78 AmJur2d 852, Waters, Sec. 406. The land that was washed away did not border on the main channel of the Willamette river, nor was the washing away of the land gradual.

To prove erosion, State relies on the finding

of the trial court:

> "It was estimated then [January of 1906] that roughly one-quarter of the flow of the river was carried through Fischer Cut."

January is the middle of the rainy and high water season in Oregon. It is only natural that at that time of year the high water chute would be carrying part of the flow of the river. This does not support the erosion theory.

State contends that unless the total change of channel is instantaneous there is no avulsion.

There are only three recognized forms of movement of a river:

1. Erosion. (Defined and discussed, supra, p. 11.)

2. Accretion. Accretion is the increase of riparian land by the gradual deposit, by water, of solid material, whether mud, sand, or sediment, so as to cause that to become dry land which was before covered by water. 78 AmJur2d 851, Waters, Sec. 406. State does not contend that an accretion occurred.

3. Avulsion. Avulsion has numerous definitions:

a) The sudden and perceptible gain or loss of riparian land.

b) The sudden washing from one of its banks of a considerable body of land and the depositing of it

on the opposite bank.

c) The sudden abandonment of an old channel and the formation of a new one.

Thompson, Real Property (1957 Replacement), Volume 5A, page 612, Sec. 25.61.

Avulsion has also been defined "...so far as concerns practical purposes, when the change is not by accretion, it is by avulsion." Anderson-Tully, supra at 540, 541.

Another definition would be where there is a change of channel which leaves an intervening strip of land undisturbed by the change of channel irrespective of the length of time required for the change to occur.

The latter definition has been approved:

"However, when a navigable stream changes its main channel of navigation, not by creeping over the intermediate lands between the old channel and the new one, but by jumping over them or running around them and making or adopting a new course, title to riparian lands, which may have become islands, remains unaffected, notwithstanding the change from the old channel to the new one was wrought gradually during several years by the increase from year to year of the proportion of the waters of the river passing over the course which eventually became the new channel, and the decrease from year to year of the proportion of the waters passing through the old channel

until finally the new channel became the main channel of navigation."

65 CJS 271, Navigable Waters, Sec. 86

Commissioners v. United States, 270 Fed. 110 (8th Cir. 1920) represents a leading authority. Although the change from the old to the new channel there extended over approximately 50 years, the Eighth Circuit applied the principle that the change was avulsive.

Commissioners, supra, cited Washington v. Oregon, 211 U.S. 127, 53 L.Ed. 119 (1908), a proceeding in which the State of Washington brought a suit in equity to settle the boundary dispute between the states in the area of the mouth of the Columbia river. Historically, the two channels, the north channel and the south channel, existed at this location. Upon admission of Oregon to the Union, the north channel was designated as its north boundary. When Washington was admitted, the same channel was designated as its south boundary. Over a period of many years the north channel filled in and the south channel became the channel of navigation. Washington contended that this change brought about a change of boundary enlarging the area of that state. The Supreme Court rejected the contention, 53 L.Ed. at 136:

"These considerations lead to the conclusion that when, in a great river like the Columbia, there are two substantial channels, and the proper authorities have named the center of one channel as the boundary between the states bordering on that river,

the boundary, as thus prescribed, remains the boundary, subject to the changes in it which come by accretion, and is not moved to the other channel, although the latter, in the course of years, becomes the most important and properly called the main channel of the river."

Also approving the rule are Durfee v. Keiffer, (Neb.) 95 NW2d 618 (1959) and Anderson-Tully, supra.

Farnham also supports such a definition:

"So, no change of boundary is worked by a change of its channel by a river forming the boundary between two tracts of land, by the gradual cutting of a new channel during freshets, extending over several years, where during such period nearly all the water returns to the old channel after freshets until such new channel is cut through, when the old channel is abandoned and nearly all the water flows through the new one, as such a change is an avulsion rather than an accretion."

3 Farnham, Waters and Water Rights, Sec. 847, 2492

Gould, Law of Waters, 3d Ed., Sec. 159 states:

"But if the change is violent and visible and arises from a known cause, such as a freshet, or a cut through which a new channel is formed, the original thread of the stream continues to mark the limits of the two estates."

In Nebraska v. Iowa, 143 U.S. 359, 36 L.Ed. 190, it was held that where the Missouri river, which had flowed in an oxbow, cut across the neck of the peninsula there was no change in boundary and Nebraska did not acquire title to any portion of the new bed or of the land intervening between the oxbow and the new channel, the boundary between the states continuing in the middle of the abandoned channel. While this is a boundary case, as was Washington v. Oregon, supra, it supports the proposition that what was formerly privately owned dry land continues in private ownership.

State contends the formation of the new channel must be "sudden" and that if it is nct then it is "erosion". Anderson-Tully, supra, refutes this by declaring that what is not an accretion is an avulsion.

Another approach to the problem is to apply the law of submergence. When privately owned land is submerged, not by the process of erosion in the classic sense (i.e. where water erodes away the bank), the land continues in private ownership subject to the public servitude of navigation and fishery.

> "Privately owned land does not lose its character as such by the inflow of navigable waters, except to the extent that private rights must yield to the dominant public right of navigation therein, together with incidents necessary to the

> enjoyment of the right."
>
> 65 CJS 275, Navigable Waters, Sec. 87b citing Bohn v. Albertson, 238 P2d 128, (Cal. 1952) (at pages 140-41), People v. Johnson, 166 NYS2d 732, and People v. Kracmer, 164 NYS2d 423.

By whatever name the change of channel into Fischer Cut is called, it does not work a change of ownership to State of the private land constituting the new bed.

PROPOSITION IV

THE TITLE TO THE ABANDONED BED IS NOT IN ISSUE IN THIS CASE.

ARGUMENT

In its "Questions Presented" State asks,

> "...does federal law deprive the public of title to the beds of both channels?"

No reliable evidence was offered in the case as to the present condition and use of the abandoned channel of the Willamette which before 1909 flowed around Fischer Island. (Ex. 62) (App. 40) The title to that channel was not in dispute between the parties as Corvallis Sand made no claim to it.

Not being an issue in this case, and complete

evidence not having been presented to the trial court, the ownership of the abandoned bed is not properly before this court.

If it is considered to be before this court, the channel is no longer needed for public navigation and would revert to the riparian owners on either bank of the abandoned channel. Bonelli, supra, 38 L.Ed. at 539, 540, 541.

PROPOSITION V

TO GRANT TITLE TO THE STATE TO THE LAND UNDERLYING FISCHER CUT WOULD BE A TAKING OF PRIVATE PROPERTY WITHOUT COMPENSATION AND IN VIOLATION OF DUE PROCESS.

ARGUMENT

Both the Constitution of the United States and the Constitution of Oregon prohibit the taking of property without just compensation as a violation of due process.(4)

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(4)Constitution of United States, Amendment XIV, Section 1:

"...nor shall any state deprive any person of life, liberty, or property, without due process of law..."

Constitution of United States, Amendment V:
"No person shall ... be deprived of life, liberty, or property, without due process of law;"

The bed of Fischer Cut was originally patented out by the United States and was in private ownership in 1909 and still is of record in private ownership. (Exs. 263, 264 and 265 being the original patent and chain of title to Corvallis Sand.)

A judicial declaration that the title passed to State when the land was inundated in 1909 would be a taking of that property in violation of due process.

State's brief is silent on the issue of due process.(5) The authority on the subject is limited. Bonelli, supra, 38 L.Ed. at 541, quoted (from the concurring opinion of Mr. Justice Stewart) Hughes v. Washington, 389 U.S. 290, 298, 19 L.Ed.2d 530, 88 S.Ct. 438 (1967) as follows:

"Although the state made no attempt to take accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private property into public property without paying for the privilege of doing so. The due process clause of the 14th Amendment forbids such confiscation by the state no less through its courts than

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Constitution of Oregon, Article I, Section 18:
"Private property or services taken for public use. Private property shall not be taken for public use, nor the particular services of any men be demanded, without just compensation; ..."

(5)The briefs of the State of Washington and the State of California joined by 22 other states are also silent on the issue of due process.

through its legislature, and no less when a taking is unintended than when it is deliberate."

Here, the taking would be even more flagrant. The land forming the bed in Fischer Cut is not riparian land but is fee simple land of record in private ownership. The laws of accretion and erosion do not apply to avulsive channels, Arkansas v. Tennessee, 246 U.S. 158, 62 L.Ed. 638 (1918) because the bed remains in private ownership with no change of boundary. Also, if the river were to abandon Fischer Cut the title would clearly be in the record holder of title on the basis of re-emergence of submerged land. Bonelli, supra, 38 L.Ed. at 541.

State relies on State et al v. R. E. Janes Gravel Co., Inc., 174 SW2d 739 (Tex. 1943) for the proposition that when a change of channel takes place avulsively the state acquires title to the land underlying the new channel. This appears to be the only case that has ever so held. In the decision the court states that both parties "conceded" that it is the rule that the law of Texas is in accordance with the decision. (Page 741) The decision is silent as to due process and there is no explanation given as to how title automatically vests in the state because navigable water now flows over what had been private land. The decision is based on a gross misconception of the law of property pertaining to the public right of navigation and fishery and of the law of due process. In Janes the court held that because the river now flowed into what had formerly been a gravel pit the owner of the pit must pay the state royalty for gravel materials removed from the pit area. The source of the state's authority

was a statute which presumably grew out of the misconception that where navigable fresh water rivers are concerned there are no limitations on the authority of the state to deprive private owners of their rights. The decision is clearly in violation of due process and is not reliable precedent.

Even though Janes is accepted as precedent it would not apply to Fischer Cut because Oregon has no such statute.

State also relies on such cases as Martin v. Waddell, 41 U.S. 367 (16 Pet. 1842) for the proposition that the state owns the beds of all navigable streams. Martin and the other cases relied upon involved disputes between either a governmental unit and the riparian or adjacent riparians. The cases all involved either tide water or the beds of navigable fresh water streams which had not changed other than by the gradual processes of accretion or erosion. As such, they are not authority for the claim that title automatically vests in the state when the waters of a river encroach by other than erosion upon privately owned land.

A declaration that title to this land has passed to State would be in violation of due process.

PROPOSITION VI

THERE IS NO ADEQUATE REASON FOR GRANTING TITLE

TO STATE TO THE BED UNDERLYING FISCHER CUT.

ARGUMENT

State contends that it requires ownership of the bed underlying Fischer Cut for the following reasons:

1. To protect fishery.

2. To protect navigation.

3. To protect the public recreational use of the river.

4. To establish a scenic waterway under the Oregon "Greenway" Act.

5. To derive a profit from:

a. Sale of oil, gas and sulphur.

b. Transportation and storage of logs.

c. Sale of kelp and seaweed.

d. Sale of minerals.

e. Sale of sand and gravel.

f. Sale and lease of the bed of the river.

1. Fishery. The state has the authority to protect the publish fishery irrespective of the ownership of the underlying bed. 35 AmJur2d 645, Fish and Game, Sec. 1. There is no evidence in the case to establish any need for State to own the new bed to protect the

public fishery.

2. Navigation. The Federal government, under the commerce clause, has taken over the major burden of protecting navigation. The agency chiefly responsible for protecting navigation is the Corps of Engineers. State's residuary control over navigation is minimal. The Corps granted permits to Corvallis Sand to remove materials from the Fischer Cut area. (Ex. 280-307) The granting of the permits establishes conclusively there was no interference with navigation. There is no evidence in the case to show that State's responsibility to protect navigation has in any way been hindered by the fee being vested in Corvallis Sand.

3. Recreation. There is no evidence in the case establishing that the public rights of recreational use of the Fischer Cut area of the Willamette river, or of any other section of the river the underlying bed of which is in private ownership, has in any way been interfered with or diminished because of private ownership of the bed.

4. To establish a "greenway". The legislative authority for the establishing of a Willamette river greenway is covered by ORS (Oregon Revised Statutes) 390.310 through 390.368. The purposes of the greenway plan are, as set forth in State's brief, to establish scenic recreational areas, parks, to preserve historical sites and structures and to preserve mineral deposits. The law provides only as to mineral aggregate deposits that the "plan shall include the location" [of such deposits]. The act specifically provides for the acquisition of necessary easements

through purchase, gifts, or by way of condemnation.(6)

Clearly, the greenway law contemplates that private property shall not be taken except in accordance with due process. There is no provision in the act indicating the intention of the legislature to deprive any owner of his private property rights. Nor do the statutes contemplate use of the bed of the river. State has not fairly construed the intention and meaning of the statutes.

5. To receive royalties for oil, gas and sulphur. There is no evidence in the case that any of these deposits are contained in the Fischer Cut area.

6. Transportation and storage of logs. There is nothing in the evidence to indicate there has been any use of Fischer Cut for the transportation and storage of logs. Private ownership of the bed would not in any way inhibit the floating of logs in the river so long as there was no interference with other navigation.

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(6)"The department may acquire such easements by any method, including but not limited to the exercise of the power of eminent domain." ORS 390.332(1). "..each such easement may be acquired by any means including but not limited to the exercise of the power of eminent domain." ORS 390.334(1). "...the Department of Transportation may only exercise the power of eminent domain in the acquisition of lands or interests therein that are situated within the boundaries of the Willamette River greenway for state parks or recreation areas in the parcels of land described in Section ..." ORS 390.338(1).

7. Gathering kelp and seaweed. There is no evidence there is any kelp and seaweed in this area of the Willamette river.

8. Minerals. There is no evidence there are any minerals in Fischer Cut or in the Willamette river generally.

9. Sand and gravel. Sand and gravel materials obviously do not collect in the area of the river as they were removed by Corvallis Sand and Gravel Company. State seeks to require Corvallis Sand to pay for materials Corvallis Sand owns.

10. Sale and lease of the bed of the river. It is ironic State contends it must own the bed of the river to protect such public rights as navigation and fishery while at the same time acknowledging that it wants the land under Fischer Cut so that it can sell or lease it. If it in fact needs title to protect the public it cannot at the same time claim it needs title in order to dispose of the property.

There is an admitted hypocrisy in State's position. If it in fact believes that it must own the beds of rivers to protect public rights, then it should acknowledge that it should not dispose of the bed or of any minerals, sand or gravel contained therein. The contention that State needs the bed for the protection of the public obviates any argument it also needs it for the purpose of disposing of it. The admission it wishes the land so it can dispose of it also nullifies State's contention that private ownership interferes with legitimate public use.

The claim it needs the property to make a profit for the public treasury is not a proper one under law. (Port of St. Helens v. Oregon, Civil No. 74-572 (D. Or. August 28, 1975, modified October 2, 1975) set forth as an Addendum to brief of petitioner Corvallis Sand and Gravel Company at page 47 and incorporated herein by reference.) As pointed out in St. Helens:

> "...nor did it [State] introduce any evidence that it needs title for any reason other than to produce State income. The State has already sold part of Dibblee Point to the Port and it will probably sell the remainder to the Port if it acquires title. The production of revenue is not an interest sufficient to vest title in The State."

By its position State would make the private owner a trespasser if he sought, during low water stages of the river, to pass from his land to the river.

State has failed to demonstrate any legitimate need for ownership of the bed of Fischer Cut or of the bed of the Willamette generally or of any other navigable fresh water river.

CONCLUSION

The historic definitions of avulsion are unsatisfactory. The single term "avulsion" has been used to identify:

1. A situation where a large chunk of land is broken off and subsequently deposited downstream;

2. Where there has been a boundary dispute over the ownership of the abandoned bed of a river;

3. The situation where a river suddenly changes course flowing over what formerly had been dry land;

4. The situation here presented where the river from time to time made inroads over what had formerly been dry land but did not make a major shift into the new channel until after the lapse of several years.

Because unsatisfactory definitions often create theoretical rather than real problems, the traditional definitions of avulsion should be abandoned and the term should be given a practical definition "when the change is not by accretion, it is by avulsion." Anderson-Tully, supra, at 540, 541. (It would also be helpful to use some other term to identify the situation where a large chunk of land breaks away from a bank and is deposited elsewhere such as "avulsive erosion".) Accretion is identifiable because it is a normal wearing away of the bank of the river. Any change other than the normal wearing away would be identifiable as avulsion or avulsive erosion and the law would be settled.

State seeks an automatic transfer of title of the bed underlying Fischer Cut from private ownership because the land is now under water. Except for one Texas decision, the validity of which is doubtful, all legal precedent dating from the Romans is to the contrary. The precedent is based on wisdom: there is no valid reason for taking a man's land because it is now inundated. To the contrary, the private owner has already suffered substantial loss because of the presence of the river. State would complete

that loss by depriving the owner of his land.

State ignores the fact the land is not riparian but is land which was formerly tillable but which through an act of God has been immersed. Ignoring the non-riparian nature of the land, State seeks to invoke such principles as "equal footing". It contends that because of the equal footing doctrine it should be declared the owner of Fischer Cut. Equal footing means nothing more than that states admitted to the Union subsequent to the original 13 states are to be treated equally with them before the law, the new states to be neither inferior nor superior to the original states. It was universal common law at the time of the admission of the original states that an avulsive change of channel worked no change of ownership of land underlying the new channel. State seeks to be treated more favorably than the original 13 states by rewriting the law of avulsion to its advantage. Proper application of the equal footing doctrine would deny State any claim of ownership of Fischer Cut.

Corvallis Sand categorically denies that State has any genuine need for title to the bed underlying Fischer Cut. If, for the purposes of argument, it is admitted that State does have a "need" for the title, as a matter of due process the law does not take private property without compensation because some one else "needs" the land. Such a proposition is repugnant to our whole concept of justice. Further, because the law of avulsion has prohibited the taking of submerged land, it is a denial of due process to attempt, at this late date, to rewrite that law.

The indifference of all the states involved in this case to due process is surprising if not shocking. Sovereignty is not an unbridled power. The law did not start with the formation of the states. The concepts of continued ownership of submerged land had already endured for many centuries. Under the guise of "sovereignty" the states would now rewrite that law.

If there is doubt as to the applicability of the law of avulsion to this particular situation, even though the evidence is overwhelming that the significant change of channel was avulsive, then the law of submergence should be applied under which the private landowner retains his title subject to the public navigational and recreational servitude.

Whether the change is treated as an avulsion or as a submergence, the end result is the same in that the owner retains his title and the proper public rights are protected.

Respectfully submitted,

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March, 1976

I hereby certify that I served the foregoing Answering Brief for Respondent on Peter Herman, of attorneys for petitioner on the day of March, 1976, by mailing to him three true and correct copies thereof, certified by me as such. I further certify that said copies were placed in a sealed envelope addressed to the said attorney at Department of Justice, 103 State Office Building, Salem, Oregon 97310, which is his regular office address, or his address as last given by him on a document which he has filed in the within entitled cause and served on me; said sealed envelope was then deposited in the United States post office at Corvallis, Oregon, on the day last above mentioned, with the postage thereon fully paid.

Robert Mix
Attorney for Respondent